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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant
v.
DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a state tax of a specified percentage of an airline's gross income from the airline business, sought to be imposed by the State of Hawaii under Haw. Rev. Stat. § 239-6, is prohibited by 49 U.S.C. § 1513(a), which forbids a state from levying a tax on the gross receipts derived from the carriage of persons traveling in air commerce or on the sale of air transportation, and the supremacy and commerce clauses of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Hawaii were Aloha Airlines, Inc. and the Director of Taxation, State of Hawaii. The United States of America appeared as amicus curiae in support of the position of Aloha Airlines, Inc.

This proceeding was consolidated before the Supreme Court of Hawaii with *In the Matter of the Tax Appeal of Hawaiian Airlines, Inc.* (Hawaii Supreme Court No. 7751). The parties to that proceeding were Hawaiian Airlines, Inc. and the Director of Taxation, State of Hawaii. The United States of America appeared as amicus curiae in support of the position of Hawaiian Airlines, Inc.

STATEMENT OF CORPORATE AFFILIATIONS

Except for a wholly owned subsidiary, Aloha Airlines, Inc. has no affiliates, parent companies, or subsidiaries.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
THE QUESTION IS SUBSTANTIAL	6
1. The Imposition of the Hawaii Tax on Appellant is Repugnant to the Plain Language of the Federal Statute	6
2. The Hawaii Supreme Court Misconstrued the "Pre-emption" Doctrine in Endeavoring to Read the Federal Statute Narrowly	9
3. Congress Intended to Prohibit the Imposition of Taxes Such as this One	11
4. This Question is of National Significance and the Hawaii Decision is in Conflict with Decisions from Other Jurisdictions	15
5. The United States of America Views the Federal Question Raised in this Case to be Substantial	16
6. Appeal to This Court is the Only Federal Recourse Available to Appellant for Defense of the Federal Statute	17
CONCLUSION	19

APPENDIX

A. Hawaii Supreme Court opinion	App. 1
B. Hawaii Tax Appeals Court decision and order	App. 20
C. Judgment on Appeal	App. 26
D. Notice of Appeal to the Supreme Court of the United States	App. 28
E. Full text of 49 U.S.C. § 1513	App. 30
F. Full text of Haw. Rev. Stat. § 239-6	App. 32

TABLE OF AUTHORITIES

Cases	Page
Agricultural National Bank v. Tax Commission, 392 U.S. 339 (1968)	11
Albernaz v. United States, 450 U.S. 333 (1981)	10
Allegheny Airlines, Inc. v. City of Philadelphia, 453 Pa. 181, 309 A.2d 157 (1973)	15
Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979)	11
Colautti v. Franklin, 439 U.S. 379 (1979)	9
Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	10
Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972)	4, 12
Fidelity Federal Savings and Loan Association v. de la Cuesta, ___ U.S. ___, 73 L.Ed.2d 664, 102 S.Ct. 3014 (1982)	10
Galveston, H & S.A.R. Co. v. Texas, 210 U.S. 217 (1908)	9
Great Lakes Dredge & Dock Company v. Huffman, 319 U.S. 293 (1943)	18
Howe v. Smith, 452 U.S. 473 (1981)	11
In re Aloha Airlines, Inc., 56 Haw. 626, 547 P.2d 586 (1976)	7
Island Airlines, Inc. v. Civil Aeronautics Board, 352 F.2d 735 (9th Cir., 1965)	7
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	10
Maryland v. Louisiana, 451 U.S. 725 (1981)	10, 11
Railway Express Agency v. Virginia, 358 U.S. 434 (1959)	9
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	9, 10, 11
Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981)	6, 18
Schwartz v. Texas, 344 U.S. 199 (1952), *overruled*, Lee v. Florida, 392 U.S. 378 (1968)	5, 9-10, 11

State v. Cochise Airlines, Inc.,
128 Ariz. 432, 626 P.2d 596 (1980) 15

Statutes

Airport and Airway Development Act of
1970, Pub. L. No. 91-258, § 1-53,
84 Stat. 219 (1970) 4, 12, 16
Airport and Airway Revenue Act of 1970,
Pub. L. No. 91-258, § 201-11,
84 Stat. 236 (1970) 4, 12, 16
Airport Development Acceleration Act of
1973, Pub. L. No. 93-44, § 1-7,
87 Stat. 88 (1973) 4
15 U.S.C. § 391 11
28 U.S.C. § 1257 2
28 U.S.C. § 1341 (Tax Injunction Act) 17
49 U.S.C. § 1305 (1978) (Airline
Deregulation Act of 1978, § 105) 7
49 U.S.C. § 1513 ..... passim
Del. Code Ann. tit. 30, § 2301 16
Haw. Rev. Stat. § 239-6 ..... passim
Ind. Code Ann. § 6-2.1-2-2 (Burns) 16
Md. Ann. Code art. 81, § 130 16
Miss. Code Ann. § 27-65-19 16
Ohio Rev. Code Ann. § 5745.02 (Baldwin) 15
Okla. Stat. Ann. tit. 68, § 1354(C) (West) 16
Wash. Rev. Code Ann. § 82.16.020 16
W.Va. Code § 11-12A-2 16

Legislative History

Air Passenger Fees—State and Local
Charges: Hearings on H.R. 2337, H.R. 14847,
and H.R. 10326 (and Identical Bills) before
the Subcomm. on Transportation and
Aeronautics of the House Comm. on Interstate
and Foreign Commerce, 92d Cong.,
2d Sess. (1972) 13, 14
Airport Development Acceleration Act of 1973:
Hearings on H.R. 4082, H.R. 2695,
H.R. 4213, H.R. 4214, H.R. 4182 and S. 38

Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 246-53 (1973) 14
Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S. 2397, S. 3307, S. 3611 and S. 3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2d Sess. 136-40 (1972) 14
H.R. Rep. No. 601, 91st Cong., 2d Sess, reprinted in [1970] U.S. Code Cong. & Ad. News 3047 12
H.R. Rep. No. 1503, 75th Cong., 1st Sess. 3 (1937) 17-18
H.R Rep. No. 1543, 92d Cong., 2d Sess. 1-3 (1972) 14
119 Cong. Rec. 3349 (1973) 12
S. Rep. No. 12, 93rd Cong., 1st Sess. 17-22, reprinted in [1973] U.S. Code Cong. & Ad. News, 1434, 1446-51 12
S. Rep. No. 1005, 92d Cong., 2d Sess. 4 (1972) 14
H.C. Rep. No. 792 Finance on H.B. No. 57, 1963 House Journal 799 (Hawaii) 8
1963 House Journal 552 (Hawaii) 8-9
S.C. Rep. No. 850 Ways and Means on H.B. No. 57, 1963 Senate Journal 950 (Hawaii) 8

Other

Ohio Op. Att'y. Gen. No. 73-117 (1973) 15

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v.
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ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

ALOHA AIRLINES, INC. appeals from the Judgment of the Supreme Court of the State of Hawaii entered on July 7, 1982, which affirmed a decision of the Tax Appeal Court of the State of Hawaii.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii (with dissenting opinion) is reported at 65 Haw. ____ , and 647 P.2d 263. (App. 1) The decision of the Tax Appeal Court (App. 20) is not officially reported. The decisions are reprinted at the pages indicated in the Appendix to this Jurisdictional Statement.

JURISDICTION

This action was filed by the appellant, Aloha Airlines, Inc., in order to overturn an assessment against appellant of the Hawaii public service company tax under Haw. Rev. Stat. § 239-6, on the ground that the assessment is prohibited by a statute of the United States of America, 49 U.S.C. § 1513.

The opinion of the Supreme Court of Hawaii was announced on June 23, 1982, and Judgment was entered in accordance therewith on July 7, 1982. The decision of the Supreme Court of Hawaii upheld the assessment of the Hawaii public service company tax. Notice of Appeal was filed with the Supreme Court of Hawaii on August 6, 1982. (App. 28)

The jurisdiction of the United States Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2). In this case the validity of a statute of Hawaii, Haw. Rev. Stat. § 239-6, is drawn into question because of its being repugnant to a law of the United States, 49 U.S.C. § 1513, and the decision of the Supreme Court of Hawaii was in favor of validity of the Hawaii statute.

STATUTORY PROVISIONS INVOLVED

The federal and state statutes which are at issue in this case, 49 U.S.C. § 1513(a) & (b) and Haw. Rev. Stat. § 239-6, are set out in full in the Appendix at App. 30. The relevant portions are presented here. 49 U.S.C. § 1513(a) & (b) provide, in relevant part:

> § 1513. *State taxation of air commerce*
>
> *Prohibition; exemption*
>
> (a) No State . . . shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .
>
> *Permissible State taxes and fees*
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . .

Haw. Rev. Stat. § 239-6 provides, in relevant part:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students . . . the tax shall be three per cent of its gross income each year from the airline business. . . . The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

STATEMENT OF THE CASE

Aloha Airlines, Inc. (hereinafter "Aloha Airlines") is a commercial airline which carries persons, freight and mail between various islands of the State of Hawaii. Aloha Airlines' flights between these islands cross international waters. Therefore, Aloha Airlines operates its flights under authority of a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board and is a certified carrier of the United States Mails thereunder. Aloha Airlines is subject to the continuing regulation of the Civil Aeronautics Board.

Aloha Airlines' principal place of business is in Honolulu, Hawaii. However, Aloha Airlines has permanent sales offices located in six other states as well as in Canada and Japan. In addition, tickets on Aloha Airlines' flights are sold world-wide in conjunction with tickets on connecting flights of other airlines. Most of Aloha Airlines' passengers are persons whose travel began somewhere outside of Hawaii.

During the four years directly at issue in this case, 1974 through 1977, Aloha Airlines was required under Haw. Rev. Stat. § 239-6 to pay the Hawaii public service company tax, computed as a percentage of its gross income from the airline business.[1] Aloha Airlines timely filed a claim for the refund of the taxes on its gross receipts from the transportation of persons on the basis that such imposition of

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[1] The amounts of tax in controversy are $811,565.27 for 1974; $979,243.67 for 1975; $1,071,892.57 for 1976; and $1,367,756.00 for 1977, or a total of $4,230,457.51. Interest on the sums paid is also at stake in this litigation. In addition, since the controversy is a continuing one, similar assessments for later years remain in dispute.

the public service company tax violated 49 U.S.C. § 1513. The Hawaii Director of Taxation denied the claim for refund and Aloha Airlines took an appeal to the Hawaii Tax Appeal Court.

On June 9, 1978 the Hawaii Tax Appeal Court ruled that the imposition of the tax was not prohibited by 49 U.S.C. § 1513 (App. 20), and Aloha Airlines timely appealed to the Hawaii Supreme Court. Hawaiian Airlines, Inc., another commercial airline with headquarters in Hawaii, filed a similar tax appeal. Upon stipulated motion, the Aloha Airlines, Inc. appeal and the Hawaiian Airlines, Inc. appeal were consolidated for argument before the Supreme Court of Hawaii. In addition, the United States of America, *amicus curiae*, filed a brief and participated in oral argument with respect to the consolidated appeal. The United States joined both airlines in arguing that the imposition of the tax on the airlines is prohibited by the federal statute.

On June 23, 1982 the Supreme Court of Hawaii entered the opinion which is the subject of this appeal. (App. 1) The Hawaii Supreme Court held that the imposition of the public service company tax, Haw. Rev. Stat. § 239-6, was not prohibited by 49 U.S.C. § 1513 or in violation of the supremacy or commerce clauses of the United States Constitution.

In its opinion, the Supreme Court of Hawaii discussed the original purposes of the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970), and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970), concluding that the legislation was designed to provide for expansion and improvement of the Nation's airport system financed through a series of user taxes. (App. 6) The court further examined the motivation of Congress in passing the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, § 1-7, 87 Stat. 88 (1973), which included the provision primarily at issue, 49 U.S.C. § 1513. The Hawaii Supreme Court concluded that the 1973 legislation was simply motivated by increased revenue needs as well as the fear that the decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), would lead to "a proliferation of similar charges at airports throughout the country." (App. 8)

The Hawaii Supreme Court then looked at the language of 49 U.S.C. § 1513. The court recognized that "read literally, the subsection [49 U.S.C. § 1513(a)] decrees a federal preemption of the

entire field of commercial aviation taxes," but concluded that 49 U.S.C. § 1513(b) "demonstrates that Congress could not have intended so broad a preemptive sweep." The court therefore concluded that its task was to "harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b)." (App. 9)

Examining the question of federal preemption of the Hawaii public service company tax, the court stated that "there is no unerring test to determine just when a state provision is without effect by reason of preemption." (App. 12) The court relied upon *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), *overruled, Lee v. Florida*, 392 U.S. 378 (1968), for the proposition that:

> It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

(App. 13)

Having concluded that there is no infallible test of preemption, the court determined that legislative intent must be relevant and made its own inferences as to what Congress had intended to accomplish by enacting 49 U.S.C. § 1513. It concluded that Congress had not intended to preempt any major taxes or primary revenue sources of the states. (App. 14) Instead, the court concluded that Congress intended primarily to preempt "head" or ticket taxes collected directly from shippers and passengers, those local charges most likely to cause delay or confusion among customers. (App. 15) Since the Hawaii public service company tax is collected from the airlines, the court concluded that it did not invade the area targeted for prohibition. (App. 16)

The court also concluded that the imposition of the Hawaii public service company tax was not incompatible with federal legislation because simultaneous compliance with the federal and state tax laws was not a physical impossibility. Since the airlines could pay both taxes, the court ruled that the federal law did not mandate invalidation of the Hawaii tax. (App. 17)

Justice Marumoto filed a dissenting opinion. He concluded that the plain language of a federal statute is controlling under the supremacy clause:

In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):

> No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom . . .

prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant cases. (ellipses in original)
(App. 18)

THE QUESTION IS SUBSTANTIAL

1. THE IMPOSITION OF THE HAWAII TAX ON APPELLANT IS REPUGNANT TO THE PLAIN LANGUAGE OF THE FEDERAL STATUTE.

The opinion of the Hawaii Supreme Court did not dispute that under the commerce clause of the United States Constitution, Congress clearly has the power to limit or to prohibit any state taxation which Congress determines imposes a burden on interstate commerce. Rather, at issue here is whether by enacting 49 U.S.C. § 1513, Congress has prohibited the application of a tax such as this one by the State of Hawaii on Aloha Airlines. It is, therefore, the interpretation of 49 U.S.C. § 1513 which is in question.

The first rule of statutory construction is that such an examination must begin with the statutory language. "The starting point of our inquiry is the plain language of the statute itself." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981).

In this instance Congress has clearly and unambiguously exercised its commerce clause power to prohibit the imposition of any state tax on the gross receipts derived from the sale of air transportation by providing in 49 U.S.C. § 1513(a):

> No State . . . shall levy or collect a tax . . ., directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* . . . (emphasis added)

Indeed, by reaching out to express in four separate ways the kinds of taxes that are prohibited, including an express prohibition of a tax on

"gross receipts," Congress could not have been any clearer.[2]

The Hawaii public service company tax is just such a tax levied or collected on the gross revenues derived from the sale of air transportation. Haw. Rev. Stat. § 239-6 provides in relevant part:

> There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business.[3]

The language of § 239-6 is clear. In fact, the Hawaii Supreme Court has affirmed that the public service company tax is to be levied and collected on all of the gross receipts from the sale of air transportation. In *In re Aloha Airlines, Inc.*, 56 Haw. 626, 547 P.2d 586 (1976), the Hawaii Supreme Court affirmed a decision of the Tax Appeal Court that "commissions retained by travel agents from *the proceeds of sales of air passage* on Aloha's flights are includable in Appellant's *taxable gross income*." 56 Haw. at 626, 547 P.2d at 586 (emphasis added). Therefore, the tax imposed by § 239-6 is levied and collected on Aloha Airlines' gross receipts from the sale of air transportation.

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[2]Although Aloha Airlines' flights are limited to flights between the islands of Hawaii, it is clear that Congress' power to regulate interstate commerce and thus to prohibit state taxation extends to the taxation of Aloha Airlines by the State of Hawaii. In addition to the interstate aspects of Aloha Airlines' operation described *supra*, at 3, flights among the islands of Hawaii necessarily represent "interstate or overseas air transportation" subject to federal regulation because they pass over the high seas, i.e., the channels between the islands of Hawaii. See *Island Airlines, Inc. v. Civil Aeronautics Board*, 352 F.2d 735 (9th Cir. 1965). In 1978 Congress confirmed that Hawaii interisland flights constitute "interstate or overseas air transportation." Part of the Airline Deregulation Act of 1978 provided that an aircraft operating between points in the same state which happens in flight to cross a boundary with another state, a foreign country, or the territorial waters of the United States should not be deemed by reasons of crossing such boundary to be operating in "interstate or overseas air transportation," but that provision expressly excluded the State of Hawaii, thus indicating that Hawaii flights continue to represent "interstate or overseas air transportation." 49 U.S.C. § 1305(b)(2). The opinion of the Hawaii Supreme Court did not rest on any contrary conclusion.

[3]Because Aloha Airlines has adopted a discount rate schedule for school groups as provided in the statute, the tax which the State of Hawaii has attempted to impose upon Aloha Airlines has been three per cent of its gross income each year from the airline business.

By virtue of 49 U.S.C. § 1513(b), the Hawaii Supreme Court purported to find "seeming contradictions" within the language of 49 U.S.C. § 1513, allegedly sufficient tc sustain the Hawaii tax. (App. 9) No such contradiction actually exists, though, as the language of § 1513(b) clearly does not negate the effect of § 1513(a):

> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added)

It is clear from the statutory language that Congress did not restrict its prohibition but merely distinguished other taxes not levied or collected on gross receipts. Nothing in subsection (b) says that a tax on such gross receipts is permissible.[4]

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[4] Although the opinion of the Hawaii Supreme Court did not rely upon such characterization, it should be noted that Haw. Rev. Stat. § 239-6 may attempt to pass itself off as a personal property tax. It states, in part:

> The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

That description cannot, however, exempt this tax under § 1513(b) from the prohibition contained in § 1513(a). As noted above, the wording of subsection (b) would not support that interpretation.

Moreover, the self-characterization of the Hawaii statute cannot be taken at face value. As observed in the dissenting opinion of Justice Marumoto, Hawaii does not have a personal property tax at this time, nor did it have one when this statute was enacted. (App. 18) Indeed, Hawaii has not assessed a personal property tax since 1947. The tax referred to as imposed by Chapter 237 is not a personal property tax but rather a general excise tax, collected as a percentage of gross income. Examination of the legislative history behind § 239-6 reveals that the sole and express purpose of its characterization as a "personal property" tax was to protect the tax from federal constitutional attack. At that time, in 1963, the federal statutory prohibition had not yet been enacted, so the Hawaii legislature's concern was with constitutional limitations. The relevant House Finance Committee Report states that:

> The purpose of this bill is to protect from attacks of unconstitutionality on the basis of the commerce clause the tax on . . . airlines . . . by clearly *characterizing* the tax as a property tax, measured by gross income.

H.C. Rep. No. 792 Finance on H.B. No. 57, 1963 House Journal 799 (emphasis added). Similarly, see S.C. Rep. No. 850 Ways and Means on H.B. No. 57, 1963 Senate Journal 950. In the House floor debate preceding final passage of the bill, according to the official record: "Representative McClung explained that the bill

The interpretation offered by the Hawaii Supreme Court is, therefore, directly contrary to the plain language of 49 U.S.C. § 1513. Moreover, since the Hawaii Supreme Court's interpretation of subsection (b) of that statute would, in effect, nullify the provision contained in subsection (a), it runs afoul of a second fundamental rule of statutory construction, which is "that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). If a tax which requires Aloha Airlines to pay a levy of three percent of "its gross income each year from the airline business" does not constitute a tax "directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom," then the entire federal statute has been rendered meaningless, inoperative, and insignificant.

2. THE HAWAII SUPREME COURT MISCONSTRUED THE "PRE-EMPTION" DOCTRINE IN ENDEAVORING TO READ THE FEDERAL STATUTE NARROWLY.

This Court has, over the years, discussed the pre-emption doctrine on several occasions. It is true, as observed in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), that whether Congress has precluded state action in a particular case is "often a perplexing question." And, it is true that this Court has observed on several occasions that it should not be lightly inferred that Congress has intended to pre-empt a state's authority. So, it was stated in *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), *overruled, Lee v. Florida*, 392 U.S. 378 (1968):

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would put all taxable businesses . . . under one tax statute to *get around* the problem of interstate commerce." 1963 House Journal 552 (emphasis added).

The legislature's attempt to circumvent a federal prohibition merely by inserting the property tax label cannot be given effect. In *Galveston, H. & S.A.R. Co. v. Texas*, 210 U.S. 217 (1908), this Court struck down an attempt to validate an unconstitutional tax by the use of a label:

> A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, *by giving the tax a particular name or by the use of some form of words*, can take away our duty to consider its nature and effect.

210 U.S. at 227 (emphasis added). Similarly, see *Railway Express Agency v. Virginia*, 358 U.S. 434, 441 (1959).

> It will not be presumed that a federal statute was intended to supercede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Similarly, see *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. The Hawaii Supreme Court noted and relied upon these statements in reaching its conclusion. (App. 13) In implying that any presumption should operate in favor of the state statute here, however, the Hawaii Court plainly erred.

The decisions cited above and relied upon by the Hawaii court involved federal statutes and regulations which did not expressly limit the authority of the state, but rather posed implicit conflicts. In such instances, it was necessary to determine whether it was the intent of Congress in each such case to displace the state authority. Pre-emption may, however, be "either express or implied." *Fidelity Federal Savings and Loan Association v. de la Cuesta*, ____ U.S. ____, ____, 73 L.Ed.2d 664, 675, 102 S.Ct. 3014, 3022 (1982). Pre-emption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In this case, the pre-emption is explicit. The federal statute involved, 49 U.S.C. § 1513, prohibits certain state taxation, in so many words. That statutory language represents, in the words of *Schwartz v. Texas*, 344 U.S. at 202-03, "a clear manifestation of intention" to "supercede the exercise of the power of the state." Indeed, such statutory language represents the clearest such manifestation possible.

There is no room here, therefore, for any presumption that Congress did not intend to exercise federal supremacy or for extraordinary efforts to read the federal statute narrowly. The statute does not leave such pre-emption to be inferred; rather, it spells it out precisely.

If there is any presumption to be applied here, it runs in the other direction. The plain language of the statute here prohibits state taxation of gross receipts derived from the sale of air transportation. "Absent a 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Albernaz v. United States*, 450 U.S. 333, 336 (1981), quoting *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Thus, when the Court has been presented with cases involving express prohibitions of state taxation, as opposed to allegedly implied pre-emption of state authority, it has applied and enforced the prohibition without reference to the "presumptions" of *Maryland v. Louisiana*, *Schwartz*, and *Rice*. For example, in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), the issue was whether the New Mexico "electrical energy tax" ran afoul of 15 U.S.C. § 391, which prohibited any state from imposing a tax on the generation of electricity which discriminated against out-of-state residents. In reaching the conclusion that the New Mexico tax was prohibited, the Court simply examined the state tax and determined that it was within the confines of the explicit prohibition stated by Congress in 15 U.S.C. § 391, and did not find it appropriate or necessary to refer to any "presumption" in favor of the state statute. Similarly, see *Agricultural National Bank v. Tax Commission*, 392 U.S. 339 (1968).

Where Congress has, by the language of the federal statute, explicitly prohibited or restricted the authority of the states, in this instance to impose a certain form of taxation, the application of a presumption in favor of the state statute or of a notion that the federal statute should be narrowly construed does violence to the supremacy clause of the United States Constitution. The decision of the Hawaii Supreme Court here confused this Court's decisions concerning "implied pre-emption" with the more applicable "express prohibition" precedents, thereby failing to give adequate recognition to federal supremacy. In its misperception of the relevent law, therefore, that decision has raised a substantial federal question.

3. CONGRESS INTENDED TO PROHIBIT THE IMPOSITION OF TAXES SUCH AS THIS ONE.

As established above, the language of 49 U.S.C. § 1513(a) is plain in prohibiting the application of this tax by the State of Hawaii on Aloha Airlines. Further, that language must ordinarily be deemed conclusive. "When the terms of a statute are unambiguous, our inquiry comes to an end, except in rare and exceptional circumstances." *Howe v. Smith*, 452 U.S. 473, 483, (1981) (citations and internal quotations omitted). The Hawaii Supreme Court, nevertheless, relied upon its reading of the legislative history to hold that Congress did not intend to prohibit the application of the Hawaii tax. That conclusion was erroneous. Indeed, the clear expression of

legislative intent is quite to the contrary of the Hawaii court's perception, for it is plain that Congress intended to forbid the imposition of taxes such as this one.

Congress enacted the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970), and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970), in order to provide federal assistance in the development and expansion of the nation's airport system. This program was to be primarily financed by a tax of eight per cent of the gross receipts from the sale of domestic passenger tickets, a tax of five per cent of receipts from air freight, and a flat $3.00 tax on each international passenger ticket. H.R. Rep. No. 601, 91st Cong., 2d Sess., 1, 35-36, reprinted in [1970] *U.S. Code Cong. & Ad. News* 3047, 3082.

It was intended that the 1970 legislation would provide a uniform system of taxation for air transportation with the federal tax being the only tax imposed upon the air transportation system. See 119 Cong. Rec. 3349 (1973). In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972), however, it was held that notwithstanding the federal eight per cent tax on air tickets, under certain circumstances states or municipalities might also constitutionally tax passenger air travel.

Congress viewed this possibility as a direct threat to the federal airport and airway program established in 1970. The Senate Committee on Commerce strongly criticized the possibility of state taxation as posed by the *Evansville* decision because it would probably increase the cost and discourage the use of air travel. S. Rep. No. 12, 93rd Cong., 1st Sess. 17-22, reprinted in [1973] U.S. Code Cong. & Ad. News, 1434, 1446-51. In addition, the Senate Committee expressed concern that any state taxation of the gross receipts from the sale of air tickets could provide a "financial windfall" to the states, because there could be no assurance that the revenues received by the states would be spent for airport facilities. *Id.* at 1446. The Senate Committee therefore determined that it was necessary to forbid state taxation on the carriage of passengers by air in order to protect a rational program of airport development funded by a uniform federal tax. *Id.* at 1455. The result was the enactment of the statute at issue, 49 U.S.C. § 1513, a statute intended to impose a broad federal prohibition against state airline taxes.

In contrast, the Hawaii Supreme Court appears to have concluded

from the legislative history that Congress intended to prohibit only "head" taxes and taxes imposed directly on the passengers and freight users of the aviation system, rather than taxes imposed on airlines. That view seems impossible to square with the language in 49 U.S.C. § 1513(a) prohibiting taxation of "the gross receipts derived therefrom"; if Congress meant to forbid only head taxes it would not have included words which could only refer to the airlines. It is true that Congress meant to eliminate head taxes, as recounted in the legislative history cited by the Hawaii Supreme Court, but that does not mean that it meant to prohibit only such head taxes. A brief review of the history of the drafting of 49 U.S.C. § 1513 clearly reveals that it was intended more broadly to prohibit taxes such as the Hawaii public service company tax.

Congress first considered a prohibition of state taxes even before the *Evansville* decision. The original proposal, H.R. 2337, provided that: "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly on the carriage of persons in air transportation. . . ."[5] This broad prohibition was expanded in two subsequent bills, H.R. 14847 and H.R. 14991, to provide: "No State . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, on persons traveling in air transportation. . . ."[6] Thus, even in its earliest drafts, the legislation which was to evolve into 49 U.S.C. § 1513 prohibited not only state taxes on passengers, but also state taxes on airlines.

When the *Evansville* decision was announced, Congress moved to enact a broad prohibition against state taxation. In congressional hearings Whitney Gillilland of the Civil Aeronautics Board testified regarding the general dangers of the proliferation of state and local air transportation taxes. He referred specifically to an Ohio tax on the

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[5]See Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and Identical Bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess. 24 (1972).

[6]*Id.* at 27.

gross receipts of an airline business.[7] That Ohio tax, levied on airlines and measured by four per cent of the gross receipts of the airline from the activity, was virtually identical in function and measure of tax to the Hawaii public service company tax.

In accord with this concern, a bill introduced by Senator Cannon, S.3755, further expanded the prohibition against state and local taxation specifically to cover state gross receipts taxes on airlines:

> Sec. 1113. No State (or political subdivision thereof) shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation, . . . or on the gross receipts derived therefrom. . . .

S. Rep. No. 1005, 92d Cong., 2d Sess. 4 (1972). The language of S. 3755 was adopted by the Senate-House Conference Committee, with minor variations not relevant here. H.R. Rep. No. 1543, 92d Cong., 2d Sess. 1-3 (1972). Ultimately, however, the bill was pocket vetoed.

In 1973, a similar bill was reintroduced. At that time, the Ohio gross receipts tax was again specifically examined. Theodore Koetz, Ohio deputy tax commissioner, argued for the fairness of state gross receipts taxes and urged adoption of an exemption from the proposed federal prohibition for state gross receipts taxes.[8] Despite this appeal, in clear recognition that the legislation would bar state gross receipts taxes, Congress again passed the prohibition which is now law as 49 U.S.C. § 1513.

Thus, there is no conflict whatsoever between the legislative history of 49 U.S.C. § 1513 and the plain language of the statute. Congress clearly intended to and ultimately did prohibit the imposi-

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[7]Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S.2397, S.3307, S.3611 and S.3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2nd Sess. 136-40 (1972) (Statement of Whitney Gillilland); Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and Identical Bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2nd Sess. 52 (1972) (Statement of Whitney Gillilland).

[8]Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S.38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 246-53 (1973) (Statement of Theodore Koetz).

tion of all state taxes on the gross receipts from the sale of air transportation. Because the decision of the Hawaii Supreme Court depends on the opposite conclusion, it cannot be sustained.

4. THIS QUESTION IS OF NATIONAL SIGNIFICANCE AND THE HAWAII DECISION IS IN CONFLICT WITH DECISIONS FROM OTHER JURISDICTIONS.

The problem posed by this tax is not unique to Hawaii. Other states and jurisdictions have enacted and attempted to impose identical or similar taxes, and still more may consider doing so. Nor is this the only litigation posing this question. The decision of the Hawaii Supreme Court is, however, the first final determination by a state judiciary sustaining this kind of tax in the face of 49 U.S.C. § 1513(a). The other states which have already reached final determinations have uniformly reached results exactly the opposite of the decision appealed here.

The City of Philadelphia attempted to impose a flat charge for each passenger embarking at the city's airport. In *Allegheny Airlines, Inc. v. City of Philadelphia*, 453 Pa. 181, 309 A.2d 157 (1973), the Pennsylvania Supreme Court merely cited the federal statute and struck down the tax, relying upon the plain language of 49 U.S.C. § 1513(a).

As noted above, Ohio formerly imposed an excise tax, measured as a percentage of gross receipts, on the privilege of engaging in the business of transporting persons or property by air within that state. The Attorney General of the State of Ohio rendered an opinion to the state tax commissioner that this tax was prohibited by 49 U.S.C. § 1513(a). See Ohio Rev. Code Ann. § 5745.02 (Baldwin); Ohio Op. Att'y. Gen. No. 73-117 (November 20, 1973).

Similarly, Arizona imposed a tax at the rate of one per cent on the gross proceeds or sales of companies engaged in the business of transporting passengers or freight by aircraft. In *State v. Cochise Airlines, Inc.*, 128 Ariz. 432, 626 P.2d 596 (1980), the Court of Appeals of Arizona found the imposition of the Arizona tax on passenger revenue to be prohibited by 49 U.S.C. § 1513(a).

Those Ohio and Arizona taxes and the current Hawaii tax are all imposed upon the same gross proceeds from the sale of air transportation. If the Hawaii decision is affirmed, it will effectively reverse contrary determinations in other jurisdictions and affirm the only precedent vitiating 49 U.S.C. § 1513(a).

The disposition of this case will also guide pending litigation in other jurisdictions. In *Air Transportation Association of America v. New York State Department of Taxation and Finance*, Memorandum Decision, Supreme Court, Albany County, New York, Special Term (June 3, 1982), the court applied 49 U.S.C. § 1513(a) to prohibit the imposition of a New York tax. That decision is on appeal. Litigation is also currently in progress in Alaska, *Wien Air Alaska, Inc. v. State of Alaska, Department of Revenue*, State of Alaska, Superior Court Appeal No. 3AN-81-8582 (filed December 10, 1981), and *Alaska Aeronautical Industries, Inc. v. State of Alaska, Department of Revenue*, State of Alaska, Superior Court Appeal No. 3AN-81-4286 (filed June 22, 1981). The potential for similar litigation exists in Delaware (Del. Code Ann. tit. 30, § 2301(d)), Indiana (Ind. Code Ann. § 6-2.1-2-2 (Burns)), Maryland (Md. Ann. Code art. 81, § 130), Mississippi (Miss. Code Ann. § 27-65-19, for years prior to 1979 only), Oklahoma (Okla. Stat. Ann. tit. 68, § 1354(C)(West)) Washington (Wash. Rev. Code Ann. § 82.16.020), and West Virginia (W. Va. Code § 11-12A-2).

The question presented by this appeal is, therefore, of nationwide interest. Based on the results to date elsewhere, it is the decision of the Hawaii Supreme Court which is out of step. Affirming the decision of the Hawaii Supreme Court would likely lead to a widespread avoidance of the prohibition contained in 49 U.S.C. § 1513(a).

5. THE UNITED STATES OF AMERICA VIEWS THE FEDERAL QUESTION RAISED IN THIS CASE TO BE SUBSTANTIAL.

The United States of America has presented its view on the question raised in this case by appearing *amicus curiae* before the Hawaii Supreme Court in this case to support the position of the airlines. As expressed at that time, in its view the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970), and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970), constitute a significant and important federal program for the development of air commerce. Any additional state or local taxes imposed upon the same tax base, the gross receipts or revenues of commercial airlines, threaten to disrupt the federal fiscal program to improve the airport and airway system.

In the stated view of the United States before the Hawaii court, "when, as we contend, such local tax burdens fall within federal statutory prohibitions contained in 49 U.S.C. 1513, the interest of the United States in addressing such local tax burdens is clear and obvious." Brief of the United States of America, *amicus curiae*, at 4. Because an important federal program is in jeopardy if the imposition of Hawaii tax is affirmed, clearly a substantial federal question is presented by this case.

6. APPEAL TO THIS COURT IS THE ONLY FEDERAL RECOURSE AVAILABLE TO APPELLANT FOR DEFENSE OF THE FEDERAL STATUTE.

In this action, Aloha Airlines is defending the effectiveness of the federal statute, 49 U.S.C. § 1513. It appears that Aloha Airlines is barred from bringing its case in the lower federal courts because the issue involves the imposition of a state tax, and under the Tax Injunction Act, 28 U.S.C. § 1341, recourse to the federal courts in such cases is limited. The Act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Thus, unless the taxpayer can demonstrate that state court procedures are not "plain, speedy and efficient," it must state its defenses to the taxation, including rights under federal law, in the state system, and it is precluded from seeking relief in a federal district court. In compliance with the dictates of the Act, Aloha Airlines has proceeded through the Hawaii system.

The Tax Injunction Act is not meant to preclude all federal review, however. The need for a federal forum to provide a check on adverse decisions bearing on federal rights by state courts and state tax appeals was recognized by Congress when it enacted 28 U.S.C. § 1341. Responding to the question of a need for a federal forum, the House Judiciary Committee Report stated:

> But it must be remembered that in such cases, in the event of an adverse decision of the State court, an appeal lies to the United States Supreme Court so that the contestant may ultimately have his constitutional rights determined by the highest Federal court, even though he may not have access in the first instance to the United States district courts.

H.R. Rep. No. 1503, 75th Cong., 1st Sess. 3 (1937).

In observing the limitations of the Tax Injunction Act, this Court has noted the availability of such appellate review and has assured litigants that if the taxpayer proceeds unsuccessfully through a state court system, he may then "assert his federal rights and secure a review of them by this Court." *Great Lakes Dredge & Dock Company v. Huffman*, 319 U.S. 293, 301 (1943); see *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 515 n. 19 (1981). This system with availability of review by this Court, in the words of *Great Lakes Dredge*, 319 U.S. at 301, "affords an adequate remedy to the taxpayer."

The adequacy of that remedy rests, though, upon review by this Court. Aloha Airlines followed the prescribed course of seeking relief from the Hawaii tax appeal system, but it was rebuffed in that effort. Protection of Aloha Airlines' rights and, in a larger sense, defense of the effectiveness of 49 U.S.C. § 1513 depend upon effective review by this Court of the Hawaii decision.

CONCLUSION

The decision of the Supreme Court of Hawaii must be reversed. Its interpretation of 49 U.S.C. § 1513 is contrary to the plain language of that statute and vitiates it. It rests on a misconception of pre-emption precedent in a situation where the Congressional prohibition of state taxation is explicit. Further, the decision is contrary to the legislative history of the federal statute at issue.

Moreover, the question posed is a significant one. Similar tax statutes have been enacted by other jurisdictions, and an affirmance of the Hawaii decision would likely lead to other such statutes. The Hawaii decision is in conflict with decisions from other states. The threat to the federal fiscal scheme for financing airport and airway development is clear.

Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1981

In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer (Case No. 1772)

and

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer (Case Nos. 1853 and 1868)

NOS. 7078 and 7751

APPEALS FROM THE TAX APPEAL COURT

HONORABLE YASUTAKA FUKUSHIMA, JUDGE

JUNE 23, 1982

RICHARDSON, C.J., LUM, NAKAMURA, J., RETIRED JUSTICE MARUMOTO IN PLACE OF OGATA, J., DISQUALIFIED, AND RETIRED JUSTICE MENOR ASSIGNED BY REASON OF VACANCY

OPINION OF THE COURT BY NAKAMURA, J.

Aloha Airlines, Inc. and Hawaiian Airlines, Inc. (hereafter Aloha and Hawaiian, respectively; the taxpayers, collectively) challenge the taxation of inter-island air carriers under the Public Service Company Tax Law, HRS Chapter 239, in these consolidated appeals from the Tax Appeal Court. They claim the assessment of a tax on the "gross income each year from the airline business" pursuant to HRS § 239-6[1] runs afoul of the federal constitution's Supremacy and Commerce Clause[2] because 49 U.S.C. § 1513 proscribes the levy of a tax premised on "the gross receipts derived" from air transporta-

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[1] HRS § 239-6 reads as follows:

> Airlines, certain carriers. There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below travelling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business. There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

[2] Article VI of the United States Constitution provides in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

and Article I, § 8, cl. 3 provides that:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

tion.[3] We conclude the State tax in question, as applied to the taxpayers, has not been rendered unconstitutional by the foregoing federal legislation and affirm the Tax Court's decisions.

I.

Aloha and Hawaiian are Hawaii corporations engaged in the transportation of persons, property, and mail by air between terminal and intermediate points in Hawaii. Prior to the enactment of S.L.H. 1981, c. 167, they fell within the meaning of "Public service company" as the term was defined in HRS § 239-2 because a common

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[3] 49 U.S.C. § 1513, in relevant part, reads:

State Taxation of air commerce

(a) Prohibition; exemption

No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Permissible State taxes and fees

Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

carrier by air was deemed a public utility by HRS § 269-1.[4] *See In re Tax Appeal of Aloha Airlines, Inc.*, 56 Haw. 626, 627, 547 P.2d 586, 587 (1976). Although the crucial federal statute was enacted in 1973 as part of the Airport Development Acceleration Act of 1973, the taxpayers nevertheless continued to file annual returns as required by HRS § 239-4 and to pay the tax as prescribed by HRS § 239-6 without question for several years thereafter. The taxpayers' present position on the invalidity of HRS § 239-6 as it applies to airlines was initially advanced in 1977 when Aloha filed amended returns for the 1973, 1974, and 1975 calendar years. Hawaiian sought no refund of the tax payments in question until 1978 when it submitted amended returns for 1973, 1974, 1975, and 1976. All claims for refunds were summarily disallowed by the State Director of Taxation (the Director). Aloha's return for 1976 and Hawaiian's return for 1977 reflected their present views regarding the unconstitutional nature of the Public Service Company Tax. The Director, however, ruled 49 U.S.C. § 1513 was "not applicable for Hawaii tax purpose," and assessments consistent with HRS § 239-6 were made. Timely appeals to the Tax Appeal Court from the Director's determinations on the refunds and assessments followed.

The appeals were submitted to the Tax Appeal Court for decision on stipulated facts and briefs filed by the taxpayers and the Director. Aloha and Hawaiian conceded they were public service companies within the meaning of HRS § 239-2, but argued, as they do here, that there is an irreconcilable conflict between HRS § 239-6 and 49 U.S.C. § 1513 and the State law has been voided by the federal statute. The court rejected their arguments, ruled the Public Service Company Tax is "a property tax and a general tax," and concluded the Director properly assessed the tax against the taxpayers.

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[4]A common carrier by air is no longer considered a "public utility" within the meaning of HRS Chapter 269, which governs the activities of the Public Utilities Commission. *See* S.L.H. 1981, c. 167, § 1, Hse. Stand. Comm. Rep. No. 512, in 1981 Hse. Journal, at 1151; Sen. Stand. Comm. Rep. No. 670, in 1981 Sen. Journal, at 1201; Sen. Stand. Comm. Rep. No. 864, in 1981 Sen. Journal, at 1285. While Act 167 freed airlines of regulation by the Public Utilities Commission and the payment of certain fees and charges, HRS § 239-6 was not amended. The taxpayers ostensibly are still subject to the tax imposed by HRS § 239-6 though they may not be public utilities or public service companies as defined by HRS § 239-2.

II.

Aloha asserts the State law in question contravenes the Commerce Clause and the Supremacy Clause of the federal constitution; Hawaiian's claim of unconstitutionality is premised on the Supremacy Clause. We begin our analysis with a review of the State and federal statutory provisions involved.

A.

Hawaii's Public Service Company Tax is a direct descendant of the Public Utility Tax which was adopted in 1932. Although airlines were not covered by the tax on public utilities when it first became effective, they became subject to the tax shortly thereafter.[5] Two decades later, air carriers were exempted from payment of the utility tax and subjected to taxation under the General Excise Tax Law.[6] The legislature reconsidered this decision in 1963 and again decided inter-island air carriers should be classified with public utilities for State tax purposes; it concomitantly redesignated the Public Utility Tax as the Public Service Company Tax. *See* S.L.H. 1963, c. 147, § 2(a). Airlines have since been subject to taxation pursuant to HRS § 239-6 which delineates the basis and the rates for assessing the tax against common carriers by air and water, motor carriers, and contract carriers other than motor carriers. The foregoing provisions levy a flat four or three percent tax on gross income from utility business. Others subject to the Public Service Company Tax are likewise taxed on the basis of their gross incomes, but at varying rates (beginning at 5.885%) determined in each case by the ratio between the net income and the gross income from utility business. *See* HRS § 239-5.

Our Territorial predecessors considered the nature of the levy in question early in the history of the Public Utility Tax; they concluded it "imposes a tax comparable to the *ad valorem* real and personal

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[5] A tax designated as the Public Utility Tax was imposed on public utilities by S.L.H. 1932, c. 43, which became effective on January 1, 1933. This tax was redesignated as the Public Service Company Tax by S.L.H. 1963, c. 147, § 2(a).

Air carriers became subject to the Public Utility Tax on June 30, 1933 when a previously enacted amendment of the legal definition of "public utility" to include air carriers became effective under the terms of S.L.H. 1927, c. 100.

[6] *See* S.L.H. 1953, c. 279. This measure was presumably enacted so all air carriers operating in Hawaii, including inter-island carriers previously taxed under the Public Utility Tax Law, would be taxed in similar fashion under the General Excise Tax Law.

property taxes otherwise imposed" by the laws of the Territory of Hawaii. *Hawaii Consolidated Railway v. Borthwick*, 34 Haw. 269, 281 (1937), *aff'd*, 105 F.2d 286 (1939). And the rationale for so concluding was stated in part as follows:

> Authorities on taxation have uniformly recognized with approval the efforts of some of the States to avoid the difficulties encountered in *ad valorem* assessments of the real and personal property of utilities actually employed in the utility business by substituting a tax upon gross incomes from utilities from utility business, upon net income from the same source or both. (See Lutz, Public Finance [2d ed.] p. 462, et seq.; Luce, "Assessment of Real Property for Taxation," 35 Mich. L. Rev. 1217; Ravage, "Valuation of Public Utilities for Ad Valorem Taxation," 41 Yale L.J. 487.) And this method of taxation of real and personal property of utilities within the taxing jurisdiction has the unqualified approval of the courts. It will suffice to cite the leading cases on the subject decided by the United States Supreme Court. (See *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 453, *United States Express Co. v. Minnesota*, 223 U.S. 335, 346; *Galveston, Harrisburg, etc. Ry. Co. v. Texas*, 210 U.S. 217, 226, 227.)

Id. at 280. In the court's view, the "earning capacity of property devoted to the utility business . . . [was] reflected by gross income from [the] utility business." *Id.* at 281. We have not had occasion to examine the relevant taxing provisions since the specific language covering the taxation of airlines and other carriers was adopted in 1963.

B.

Turning to the federal statutes, we initially note the Airport and Airway Development Act of 1970, 84 Stat. 219 (the Development Act) and the Airport and Airway Revenue Act of 1970, 84 Stat. 236 (the Revenue Act) were passed in tandem "to provide for the expansion and improvement of the Nation's airport and airway system." H.R. Rep. No. 91-601, 91st Cong., 2d Sess., 1, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3047, 3047. In short, the Development Act declared a congressional policy to increase federal expenditures for the foregoing purpose and the Revenue Act was designed to provide the means for implementation. "In substantial part, this purpose . . . [was] to be achieved through the imposition and application of airport and airway user charges." *Id.* Certain taxes already in existence were increased and other new aviation user taxes

were imposed to finance the desired expansion and improvement of the system. *See* 26 U.S.C. §§ 4261 and 4271. The taxes imposed on the air transportation of persons and property were made payable in each case "by the person making the payment subject to the tax."[7] 26 U.S.C. §§ 4261(d) and 4271(b)(1). And an Airport and Airway Trust Fund was established to serve as the repository of the taxes collected and the moneys appropriated for the program.[8]

Two years later Congress' attention was redirected to the program by a perceived need for even greater federal funding of the costs of airport development. But in the meanwhile the Supreme Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), had been issued. There, the Court held the imposition of "a charge by a State or municipality of $1 per commercial airline passenger to help defray the costs of

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[7]The legislative rationale for imposing the taxes on the ultimate users of air transportation was stated as follows:

> The Ways and Means Committee's action, insofar as commercial carriers are concerned, obtains most of the additional tax revenue from passenger and freight ticket taxes by increasing the present 5-percent passenger ticket tax to 8 percent and by imposing a new $3 "head" tax on passenger tickets for international flights and a new 5-percent "waybill" tax on air freight.
>
> The decision to derive the bulk of additional commercial aviation revenue from the passenger and freight ticket taxes was based upon three primary factors. First, extensive administrative experience is available from the present collection of the 5-percent passenger tax, and the collection of the additional 3 percent is merely a matter of a change in computation on the passenger's ticket from 5 percent to 8 percent (also, before 1958, a 3-percent tax was imposed on domestic freight by rail, motor vehicle, water, and air transportation). Second, a tax upon the value of a ticket or waybill will grow not only as air traffic increases in volume but also as prices rise. Third, a ticket tax is geared to charge an equitable tax related to the distance traveled and the cost per mile of air operation, since ticket prices for short flights are more per mile than long-line flights and the tax is proportional to the price of the ticket. Ticket taxes on passengers and shippers are therefore an efficient and equitable user charge imposed directly on the ultimate passenger and freight users of the commercial sector of the aviation system.

H.R. Rep. No. 91-601, *supra*, at 38-39, [1970] U.S. CODE CONG. & AD. NEWS, at 3084.

[8]When the provisions of the Revenue Act that imposed the increased and new user taxes expired on October 1, 1980 as a consequence of Congress' failure to agree on the terms of an extension, the trust fund contained approximately $3,700,000,000 in unobligated funds. *Airport and Airway System Development: Hearings Before the Subcomm. on Aviation of the Sen. Comm. on Commerce, Science, and Transportation*, 97th Cong., 1st Sess. 87 (1981) (Statement of Darrell Trent, Deputy Secretary, Dept. of Transportation).

airport construction and maintenance," *id.* at 709, did not necessarily constitute an undue burden on interstate commerce. Fearing a proliferation of similar charges at airports throughout the country, Congress included the provisions presently codified as 49 U.S.C. § 1513 in the Airport Development Acceleration Act of 1973, 87 Stat. 88-90 (1973). That the proscriptions embodied therein were in response to the judicial approval of the new head taxes adopted by state and local governments subsequent to the passage of the Airport and Airway Development and Revenue Acts of 1970 is expressly confirmed by a pertinent legislative document. *See* S. Rep. No. 93-12, 93d Cong., 1st Sess. 1, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 1434.[9]

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[9]The report states in relevant part that:

> S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

S. Rep. No. 93-12, *supra*, at 17, [1973] U.S. CODE CONG. & AD. NEWS, at 1446.

This intent to preempt the levy of head or other user taxes is also stated in several other places in the report, to wit:

> The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

S. Rep. No. 93-12, *supra*, at 4, [1973] U.S. CODE CONG. & AD. NEWS, at 1435.

and

> S. 38 contains a prohibition on State taxation of passengers or on the carriage of passengers in air transportation. This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax.

S. Rep. No. 93-12, *supra*, at 11-12, [1973] U.S. CODE CONG. & AD. NEWS, at 1441.

The preemptive language chosen by Congress, however, is couched in the broadest terms in one subsection of 49 U.S.C. § 1513. Section 1513(a) forbids the levy or collection of a state or local

> tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

Read literally, the subsection decrees a federal preemption of the entire field of commercial aviation taxes. For every tax, fee, or charge levied on air transportation must perforce be met, directly or indirectly, from gross receipts derived from "the airline business" or by the users of air transportation. But § 1513(b) demonstrates that Congress could not have intended so broad a preemptive sweep since the subsection permits the levy and collection of state and local

> taxes other than those enumerated in subsection (a) . . ., including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services.

Property taxes, net income taxes, and franchise taxes, of course, are ordinarily derived from the "gross receipts" of airlines, and sales taxes applicable to air transportation can only be those where the incidence would normally be expected to fall on the ultimate users of airline services. Our task then is to harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b).

III.

Focusing on the allegations of unconstitutionality advanced by the taxpayers, we first address Aloha's assertion that HRS § 239-6, as it has been applied to inter-island air carriers, constitutes an undue burden on commerce.

Aloha claims the exaction of the tax in question is inconsistent with the Commerce Clause under principles enunciated in *Crandall v. Nevada*, 73 U.S. 35 (1867), *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), and *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., supra*. The cases in Aloha's estimation proclaim a "rule" that "a tax upon interstate commerce will only be constitutional if it is not excessive in comparison with the state and local governmental benefit conferred." Since the tax at issue gener-

ates revenues for the State's General Fund and not for purposes related to airport development and maintenance. Aloha argues the State confers no benefit in exchange for the levy and the tax therefore fails to pass constitutional muster.

But in *Crandall* and *Evansville-Vanderburgh*, the questioned charges were passenger head taxes imposed on persons traveling in interstate commerce, and in *Capital Greyhound Lines*, the tax in question was specifically levied on interstate and intrastate carriers for the privilege of using the roads of Maryland. Consequently, we find the foregoing citations of authority inapposite, and seek guidance instead from more recent Supreme Court decisions delineating definitive standards for determining whether a state tax infringes the Commerce Clause.

"In reviewing Commerce Clause challenges to state taxes, . . . [the] goal [of the Supreme Court] has . . . been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980)." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981). The analysis now favored by the Court is the four-part test described in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). "Under the test, a state tax does not offend the Commerce Clause if it 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.' 430 U.S., at 279." *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 617. Aloha does not dispute that the Public Service Company Tax satisfies the first three prongs of the four-part test; it argues, as we have noted, that the tax falters on the final leg because the moneys exacted by the State are not expended for airport purposes. But Aloha's belief in this regard does not reflect the Court's views.

The Court customarily affords states wide latitude in imposing general revenue taxes, and "there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of

the services provided to the activity." *Id.* at 622.[10] Moreover, this latitude is not "divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State." *Id.* at 623. For it was never "the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). And this share of the burden includes sharing in the cost of benefits such as "a trained work force and the advantages of a civilized society." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979). We experience no difficulty in concluding that the imposition of Hawaii's Public Service Company Tax on a Hawaii corporation engaged in business as an inter-island air carrier does not constitute an undue burden on commerce, and move on to the problems engendered by the Supremacy Clause.

IV.

A.

The Supremacy Clause provides that the "'Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the

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[10]The Court went on to say:

> Instead, our consistent rule has been:
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> > "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
> >
> > "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937) (citations and footnote omitted).
>
> See *St. Louis & S. W. R. Co. v. Nattin*, 277 U.S. 157, 159 (1928); *Thomas v. Gay*, 169 U.S. 264, 280 (1898).
>
> Commonwealth Edison Co. v. Montana, *supra*, 453 U.S. at 622-23.

Constitution or Laws of any State to the Contrary notwithstanding.' [U.S. Const.] Art. VI, cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect. See *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819). See *Hines v. Davidowitz*, 312 U.S. 52 (1941)." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Yet there is no unerring test to determine just when a state provision is without effect by reason of preemption. As the Court teaches us,

> [t]here is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress . . . [The] Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

Hines v. Davidowitz, supra, 312 U.S. at 67 (footnote omitted).

The preemption dispute of present concern implicates the State of Hawaii's taxing power. It is fundamental that "[t]he power of taxation is indispensable to . . . [the] existence [of state governments], and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities, at the same time." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824).[11] In this sense, it is like

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[11]The statement of Chief Justice John Marshall in this regard was:

> The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities, at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its

the police power. Hence, the "[c]onsideration [of a state tax] under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)." *Maryland v. Louisiana*, *supra*, 451 U.S. at 746. For the historic powers of the states are "not to be superseded . . . unless that . . . [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230. Or as the Court has otherwise stated,

> [i]t will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).

Rice also recounts the several ways in which congressional design to supplant state provisions "may be evidenced," namely:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations

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> nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c., to pay the debts, and provide for the common defence [sic] and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

Gibbons v. Ogden, *supra*, at 198-200.

> imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, *supra*. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538.

Rice v. Santa Fe Elevator Corp., *supra*, 331 U.S. at 230. And as the Court reiterates in *Maryland v. Louisiana*,

> [o]f course, a state statute is void to the extent it conflicts with a federal statute—if, for example, "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, *supra*, at 67.

Maryland v. Louisiana, *supra*, 451 U.S. at 747.

B.

Thus we carefully examine the statutes implicated in the present controversy to ascertain whether an unmistakable intent of Congress to displace the State law appears, mindful that there is no "infalliable constitutional test" to determine congressional purpose, *Hines v. Davidowitz*, *supra*, 312 U.S. at 67, but knowing that there are, nevertheless, several ways in which "[s]uch a purpose may be evidenced." *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230.

1.

We earlier observed that 49 U.S.C. § 1513 broadly forbids the levy by state and local governments of taxes or other charges on air commerce, yet permits the collection of a wide range of state and local taxes. But as we have also seen, the exercise of federal tax power in a particular field is not necessarily incompatible with a similar exercise of power by the states. What initially appears paradoxical in the federal statutory provisions actually tells us that the federal taxation of air transportation was not meant to nullify all state and local taxes related thereto. And if anything more may be gleaned from the enumerated exemptions in 49 U.S.C. § 1513(b), it is that the primary revenue sources of the states have been placed beyond the

preemptive reach of § 1513(a).[12]

2.

Since an inference of a pervasive federal scheme or a dominant federal interest barring the collection of all state taxes touching air transportation cannot be drawn from the relevant statutory language, we consider whether "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal . . . [a] purpose" to cause state tax laws such as HRS § 239-6 to be without effect. *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230.

The legislative history previously discussed confirms that the object of the pertinent provisions of the Airport Development Acceleration Act of 1973 was to protect the primary sources from which the Airport and Airway Revenue Act of 1970 sought revenue. *See* note 7 *supra.* These were, of course, the "[t]icket taxes on passengers and shippers . . . imposed directly on the . . . passenger and freight users of the commercial sector of the aviation system." *See* note 7 *supra. See also* note 9 *supra* and 26 U.S.C. §§ 4261 and 4271. The history further indicates a wellspring of annoyance contributing to the legislative action was the levy of "head" taxes on airline passengers by thirty-one state and local jurisdictions. S. Rep. 93-12, *supra,* at 21, [1973] U.S. CODE CONG. & AD. NEWS, *supra,* at 1450.[13] The wrath of Congress was undoubtedly directed at an unpopular tax which "brings on confusion, delay, anger and resentment and cuts

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[12]This is the view of an informed observer who states:

> The approach taken by the Airport Development Acceleration Act broadly restricts states from imposing taxes or "other charges" with respect to air commerce, but exempts from this broad restriction certain types of taxes such as property, income, franchise, and sales or use taxes. The exempted taxes are, of course, the major revenue sources for states and, accordingly, the Act effectively balances national interests and those of the states' revenue needs with respect to air commerce.

A. Parnell, *Constitutional Considerations of Federal Control Over the Sovereign Taxing Authority of the States,* 28 Cath. U. L. Rev. 227, 246 (1979) (footnote omitted).

When the law review article quoted above was written, the author was Senior Staff Counsel of the Ways and Means Oversight Subcommittee of the U. S. House of Representatives.

[13]Hawaii was not listed therein as a jurisdiction charging "head" taxes. This stands to reason, for no one has ever equated the Public Service Company Tax with a "head" tax.

against the grain of the traditional American right to travel among the States unburdened by travel taxes." S. Rep. 93-12 *supra*, at 17, [1973] U.S. CODE CONG. & AD. NEWS, *supra*, at 1446. But more significantly, these user charges also tapped the very sources of revenue that Congress had.

The State law, which antedates the Airport and Airway Revenue Act of 1970, imposes a tax on public service companies rather than the users of their services. The legislature has deemed the State levy "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value." HRS § 239-6. We would not quarrel with this legislative characterization; the tax has some attributes of a property tax. *See* note 14 *infra*. As our Territorial predecessors concluded, there is ample legal support for avoiding "the difficulties encountered in *ad valorem* assessments of the real and personal property of utilities . . . by substituting a tax upon gross incomes from utilities from utility business, upon net income from the same source or both." *Hawaii Consolidated Railway v. Borthwick, supra*, 34 Haw. at 280. For the formula "give[s] effect to the intangible factors which influence real values." *Railway Express Agency v. Virginia*, 347 U.S. 359, 364 (1954) (quoted with approval in *Railway Express Agency v. Virginia*, 358 U.S. 434, 442 (1959)). *See also Illinois Central Railroad v. Minnesota*, 309 U.S. 157 (1940).[14]

The object sought by the federal law therefore reveals nothing that would preclude the subjection of Aloha and Hawaiian to the Public Service Company Tax. Nor does the character of the obligations imposed by the Airport and Airway Revenue Act disclose anything that could cause the tax to be ineffective where airlines are concerned.

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[14] Hawaiian's report to its stockholders for 1978 states a net valuation of its "Property and Equipment" in 1977 of $43,195,318. Its reported gross income for the same year amounted to $69,079,368. We also presume there are intangibles which increase Hawaiian's value as a company and render it higher than the net value of property and equipment. This higher value could conceivably approximate the company's operating revenues. *See* Hawaiian Airlines, Annual Report 1978, at 9-10, and the Public Service Company Tax Return filed by Hawaiian on April 9, 1978.

The annual report also states that $2,930,390, representing "U.S. excise tax on transportation," was collected by Hawaiian. This sum, however, was "paid directly and not reported in passenger revenue." Hawaiian Airlines, Annual Report, *supra*, at 17. This reflects the taxation of users, not the airlines, under the federal tax scheme.

3.

What we said about the Public Service Company Tax in the preceding section would also apply to an inquiry on whether the state policy declared by HRS § 239-6 "may produce a result inconsistent with the objective of the federal statute." *Rice v. Santa Fe Elevator Corp, supra,* 331 U.S. at 230. The State does not purport to "regulate" any aspect of air commerce pursuant to § 239-6. The levy in question is a revenue measure in all respects; it does not conflict with a federal regulatory scheme in the manner than the Louisiana First Use Tax on Natural Gas did with federal statutes regulating natural gas pricing. *See Maryland v. Louisiana, supra.* Furthermore, the state tax does not invade the particular area occupied by 26 U.S.C. §§ 4261 and 4271, *i.e.*, [t]icket taxes on passengers and shippers . . . imposed directly on the . . . passenger and freight users of the commercial sector of the aviation system." *See* note 7 *supra.*

4.

We perceive no irreconcilable conflict between regimes here. "[C]ompliance with both federal and state . . . [tax laws] is [definitely not] a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul, supra,* 373 U.S. at 142-43, and HRS § 239-6 does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra,* 312 U.S. at 67.[15] Our review thus uncovers no persuasive reasons supporting preemption here, and we cannot say the nature of the federal and State taxes involved "permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul, supra,* at 142.[16]

The decisions of the Tax Appeal Court are affirmed.

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[15] We noted earlier that when pertinent provisions of the Airport and Airway Revenue Act expired on October 1, 1980, the Airport and Airway Trust Fund contained approximately $3,700,000,000 in unobligated funds. *See* note 8 *supra.* Speaking from the vantage point of hindsight, we would have to say the purpose and objective of Congress in enacting the provisions of 49 U.S.C. § 1513 were accomplished.

[16] Although the taxpayers now claim the language of 49 U.S.C. § 1513 clearly displays a preemptive design, this apparently escaped them for four years.

DISSENTING OPINION OF MARUMOTO, J.

I respectfully dissent. My dissent is based on the supremacy clause of the United States Constitution.

In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):

> No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom . . .

prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant cases.

U.S.C. § 1513(b) provides: "Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, . . .," and HRS § 239-6 provides: "The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value, and is in lieu of the tax imposed by chapter 237 [General Excise Tax Law] but not in lieu of any other tax."

I do not think that mere characterization of the tax as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value," changes the essential nature of the tax as a tax "on the sale of air transportation or on the gross receipts therefrom."

At the present time, the State of Hawaii has no personal property tax as such, and there was none at the time HRS § 239-6 was enacted.

Under HRS § 239-6, the sole basis for determing the amount of the levy or collection is the gross income from the airline business. Such basis has no relationship to the value of the personal property used in the airline, tangible and intangible, including the going concern value.

Gross income of an airline is produced by a multitude of factors besides the personal property, tangible and intangible, used in the business.

In this connection, R.L.H. 1925 § 1320, quoted below in footnote 1, which was repealed in S.L.H. 1932 Second Special Session, Act 40, Section 72, is instructive.

[1]Text of R.L.H. 1925 § 1320:

Basis of value for taxation. All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its cash value.

Land shall be equally assessed, according to its value for use or occupancy; this value shall be determined in cities and towns, and wherever else practicable, by the Somer's system or other means of exact computation from central locations.

Provided, however, that in all cases where real and personal property, or several classes or kinds or parcels or real or personal property, respectively, are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable aggregate value.

Land leased or sub-leased to others and not used by a taxpayer personally as a part of the combined property forming the basis of the enterprise for profit conducted by the taxpayer shall not be considered as a part of the combined property, nor included in the return or assessment of such property as a whole, but shall be separately returned and assessed.

In estimating the aggregate value of each such enterprise for profit, there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses; and where it is a company, being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation.

In ascertaining the aggregate value of the property constituting the basis of an enterprise for profit for the purposes indicated by this section, there shall first be included all property combined and forming the basis of such enterprise, whether within the definition of real or personal property set forth in this chapter or not, and there then shall be deducted therefrom the value of shares in other Hawaiian corporations, held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit.

Provided also, that the combined property of every corporation holding a public utility franchise and occupying the public streets or highways of the Territory, other than any such corporation that by the terms of its franchise is required to pay a percentage of its gross income to the Territory, or county or city and county, shall be valued and assessed at not less than the total amount of the par value of the capital stock issued by such corporation.

APPENDIX B

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IN THE TAX APPEAL COURT OF THE STATE OF HAWAII

In the Matter of the Tax Appeal	)	CASE NO. 1772
	)	
	)	DECISION AND ORDER
of	)	
ALOHA AIRLINES, INC.	)	
	)	

DECISION AND ORDER

This case concerns the appeal of Aloha Airlines, Inc., from the assessments of the Public Service Company Tax (hereinafter "PSC Tax") for tax years 1974 through 1977 on the grounds that such assessments are in violation of 49 U.S.C. § 1513 and the Commerce Clause.

The facts in this case are set forth in the Stipulation of Facts on file with the record of this appeal and by reference are incorporated herein and made a part of the Decision.

Appellant Aloha Airlines, Inc. is a Hawaii corporation which engages in the air transportation of persons, freight, and mail solely between airports located within this State. *Stip.* 4. Appellant does not provide air transportation between this State and any other state and thus does not derive any gross income from interstate air transportation. *Stips.* 19 and 20.

Appellant's principal place of business is in Honolulu, Hawaii. *Stip.* 21. Virtually all of Appellant's employees and personal property, including all aircraft aviation equipment and supplies, are employed or located in Hawaii, except such employees and property used in connection with six of Appellant's sales offices located outside the State. *Stips.* 22 and 23.

For the tax years 1974 through 1977, the Director has levied and assessed the PSC Tax against the Appellant pursuant to HRS § 239-6. HRS § 239-6 states that the PSC Tax is levied and assessed upon the tangible and intangible personal property of the Appellant, including going concern value, in lieu of any other personal property, franchise, or privilege tax. *Stip.* 16. No other Hawaii tax has been levied and assessed upon the personal property of the Appellant. *Stip.* 16. Appellant does not pay any tax to any other state or foreign country upon its tangible and intangible personal property, including going concern value, except for such taxes as may be paid in connection with the various sales offices located outside Hawaii. *Stip.* 27.

On January 9, 1978, Appellant filed a Notice of Appeal in this Court appealing the assessment of the PSC Tax against it for the tax years 1974 through 1977. The amounts of tax in controversy are $811,565.27 for 1974; $979,243.67 for 1975; $1,071,892.57 for 1976; and $1,367,756.00 for 1977; and, in the aggregate total $4,230,457.51. *Stips.* 1 and 3.

The issue in this case is whether the PSC Tax is levied on gross receipts or on property. If it is levied on gross receipts it is expressly

prohibited by 49 U.S.C. § 1513, and if it is levied on property it is expressly allowed by the same statute.

Appellant contends that the PSC Tax in actual operation and effect is a tax on gross receipts even though the legislature has characterized it as a property tax. *Appellant's Reply Brief*, section B. Appellant also appears to argue that even if the PSC Tax is not levied on gross receipts, but is only measured by gross receipts, it is a tax which Congress intended to prohibit under 49 U.S.C. § 1513. *Appellant's Reply Brief*, section A.

The Director contends that the PSC Tax in actual operation and effect is a tax on property measured by gross receipts. The Director also contends that Congress never intended to prohibit the PSC Tax by enacting 49 U.S.C. § 1513.

The Court agrees with the Director.

The PSC Tax is a tax levied on property. All three branches of State government, the legislature, the department of taxation, and the courts have construed the PSC Tax or its predecessor, the public utilities tax, to be a property tax. See S.C. Rep. 850 on H.B. No. 57, Act 157, SLH 1963; Hawaii Tax Information Release No. 1; and *Hawaii Consolidated Railway v. Borthwick*, 34 Haw. 269, 280-281 (1937), affirmed 105, F.2d 286 (construing the public utilities tax).

This trinity of agreement by the three branches of State government, though not conclusive, has great weight in our determination of the nature and effect of the tax. *Railway Express Agency v. Virginia*, 358 U.S. 434, 440 (1959) (hereinafter "*REA II*"). While this local view is not conclusive on this court, "it cannot be rejected unless it can be said to be ill founded." *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 454 (1918).

In order to overturn the local view, the Court must find that in actual operation the incidence of the tax falls on gross receipts rather than on property. *REA II, supra;* and *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954) hereinafter "REA I"). The U.S. Supreme Court has consistently upheld the local view of state authorities construing taxes to be property taxes, unless the state levies more than one property tax on the same property incidence. Only where the U.S. Supreme Court has been faced with the incongruity of a state levying two property taxes on the same property incidence has the Court found the evidence strong enough to find that one of the taxes is actually a tax levied on gross receipts. *REA I, supra; REA II, supra; U.S. Express Co. v. Minn.*, 223 U.S. 335 (1912); *Cudahy*

Packing Co. v. Minn., supra; Great N. R. Co. v. Minn., 278 U.S. 503 (1929). Also *Galveston H. & S. A. R. Co. v. Texas, supra; Meyer v. Wells, Fargo, & Co.*, 223 U.S. 298 (1912); *New Jersey Bell Tel. Co. v. State*, 280 U.S. 338 (1930). And even then, the U.S. Supreme Court has never struck down the local view construing the tax as a property tax without other evidence showing that the tax in question is levied on gross receipts rather than on property. *REA I, supra.*

The PSC Tax is the only State tax levied on the personal property of Appellant. *Stip.* 16. Appellant has not shown that the PSC Tax is a tax on gross receipts. Therefore the PSC Tax is in operation and effect a property tax. In addition, it should be noted that the PSC Tax, in all material respects, is indistinguishable from the franchise tax upheld by the U.S. Supreme Court in *REA II* as a tax on property.

Appellant argues that the PSC Tax is a tax on gross receipts. Appellant argues that: (1) prior to 1964, Appellant was taxed under the general excise tax, a privilege tax measured by gross receipts, (2) after 1964, Appellant was taxed under the PSC Tax instead, a tax "characterized" as a property tax to "get around" the potential Commerce Clause objections to the general excise tax, (3) that the PSC Tax is a substitute for and an extension of the general excise tax, and (4) that the measure of the PSC Tax, by gross receipts, has no fair relation to the value of Appellant's personal property and therefore the tax is in fact one on gross receipts. Even if the PSC Tax was enacted to get around the Commerce Clause objections to the general excise tax by taxing property instead of privileges, the fact remains that for all years in question Appellant was taxed under the PSC Tax on its personal property, not on its privileges. Even if Appellant has been taxed under the general excise tax, it appears that this tax also would not be prohibited under 49 U.S.C. § 1513. The tax is levied on state privileges *measured* by gross receipts, and is not levied on gross receipts. *HC&D v. Yamane*, 48 Haw. 486 (1965).

Appellant further argues that the PSC Tax is really a tax on gross receipts because a tax on property cannot be fairly measured by gross receipts. "While it may be true that gross receipts are not the best measure [of the value of property], it is too late now to question its constitutionality. [Citations omitted]." *Railway Express Agency v. Virginia*, 358 U.S. 434, 441 (1959).

As the PSC Tax is a property tax, it is expressly allowed under 49 U.S.C. § 1513(b).

"Nothing in this section shall prohibit a state . . . from the levy or

collection of taxes other than those enumerated in subsection (a) of this section, including property taxes . . ."

Congress never intended to prohibit the PSC Tax by enacting 49 U.S.C. § 1513. Congress enacted 49 U.S.C. § 1513 in response to *Evansville-Vanderburgh Airport v. Delta Airlines*, 405 U.S. 707 (1977) which allowed each state in which a traveler enplaned or deplaned to levy a flat tax as compensation for the use of airport facilities. Congress felt that the cumulative effect of such taxes greatly increased the costs of air travel and thus burdened interstate commerce. Senate Debate on the ADAA of 1973, Exhibit G. p. 3. Congress enacted 49 U.S.C. § 1513 to prohibit only head taxes and other related taxes, which require only minimal local contacts with the state and which create the risk of multiple state tax burdens.

The assessment of the PSC Tax against the Appellant does not create the risk of multiple taxation by the states. No other state can levy a property tax on the personal property of Appellant. Appellant's argument that Congress intended to prohibit taxes which merely increase costs, but do not necessarily pose the threat of multiple tax burdens, is incorrect as Congress, by the same statute, expressly allowed property taxes and all other state taxes which do not impose multiple burdens.

Allegheny Airlines, Inc. v. City of Philadelphia, 309 A.2d 157 (Pa. 1973) cited by Appellant is inapposite as the tax found by the Pennsylvania Supreme Court to be prohibited by 49 U.S.C. § 1513 was clearly a head tax. In that case the only incidences that Pennsylvania had the power to levy on were the local activities prohibited under 49 U.S.C. § 1513. In order to generate needed revenues, Pennsylvania was forced to levy on such incidences because it had no jurisdiction over the airlines to assess a property tax, like the PSC Tax, against the airlines.

Appellant also contends that the PSC Tax is a burden on interstate commerce because the tax revenues are not used to benefit the Appellant and the airport system exclusively, but instead are used to benefit the State generally. This argument is inapposite as the PSC Tax is a property tax and a general tax, not a head tax on other compensatory use tax, and therefore cannot be judged by this criterion.

IT IS ACCORDINGLY ADJUDGED, ORDERED, AND DECREED that the Director of Taxation properly assessed the PSC Tax against the Appellant and that the assessments herein appealed are deemed proper government realizations.

DATED: Honolulu, Hawaii, June 9, 1978.

/s/ Yasutaka Fukushima
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ Michael A. Shea

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APPENDIX C

NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals	TAX APPEAL COURT CASE NOS. 1853 and 1868
of	APPEAL FROM DECISION AND ORDER, FILED
HAWAIIAN AIRLINES, INC.,	JANUARY 4, 1980
Taxpayer-Appellant.	HON. YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal	TAX APPEAL COURT CASE NO. 1772
of	APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978
ALOHA AIRLINES, INC.,	
Taxpayer-Appellant.	HON. YASUTAKA FUKUSHIMA, JUDGE

JUDGMENT ON APPEAL

KEVIN T. WAKAYAMA 1865-0
Special Deputy Attorney General
Attorney for Director of
Taxation-Appellee

NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NOS. 1853 and 1868 APPEAL FROM DECISION AND ORDER, FILED JANUARY 4, 1980 HON. YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NO. 1772 APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978 HON. YASUTAKA FUKUSHIMA, JUDGE

JUDGMENT ON APPEAL

Pursuant to the opinion of the Supreme Court of the State of Hawaii filed June 23, 1982, the decisions of the tax appeal court are affirmed.

DATED: Honolulu, Hawaii, July 7, 1982.

BY THE COURT:

/s/ Clement J.H. Chun
Clerk

APPROVED:

/s/ Edward H. Nakamura
Justice

APPENDIX D

NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NOS. 1853 and 1868 APPEAL FROM DECISION AND ORDER, FILED JANUARY 4, 1980 HON. YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NO. 1772 APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978 HON. YASUTAKA FUKUSHIMA, JUDGE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

and

CERTIFICATE OF SERVICE

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NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NOS. 1853 and 1868 APPEAL FROM DECISION AND ORDER, FILED JANUARY 4, 1980 HONORABLE YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NO. 1772 APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978 HONORABLE YASUTAKA FUKUSHIMA, JUDGE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is given that Aloha Airlines, Inc., the Taxpayer-Appellant above named, hereby appeals to the Supreme Court of the United States from the Judgment on Appeal of the Supreme Court of Hawaii entered in this action on July 7, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: Honolulu, Hawaii, August 6, 1982.

/s/ Michael A. Shea
RICHARD L. GRIFFITH
MICHAEL A. SHEA

Attorneys for Appellant
ALOHA AIRLINES, INC.

APPENDIX E

49 U.S.C. § 1513

§ 1513. State taxation of air commerce

Prohibition; exemption

(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

Permissible State taxes and fees

(b) Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Nonapplicability of subsec. (a) to airport operating authority until December 31, 1973

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) of this section shall not apply to such authority until December 31, 1973.

APPENDIX F

Haw. Rev. Stat. § 239-6

§ 239-6 Airlines, certain carriers. There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business. There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.